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MAY 14 1997

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

**Federal Communications Commission
Office of Secretary**

In the Matter of

**PETITION FOR A RULEMAKING TO
REQUIRE COUNTER-ADS TO ADDRESS
ALCOHOL ADVERTISING IN BROADCAST
MEDIA**

)))))))

To: The Commission

PETITION OF

NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, INC.
AND
MOTHERS AGAINST DRUNK DRIVING, ET AL.

**FOR A RULEMAKING
TO REQUIRE COUNTER-ADVERTISEMENTS
TO ADDRESS ALCOHOL ADVERTISING IN BROADCAST MEDIA**

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SUMMARY

The Federal Communications Commission should adopt a rule requiring counter-advertisements in response to alcohol advertisements in the broadcast media.

High risk alcohol consumption is an enormous problem in the U.S., especially among young people. Alcohol is easily accessible by youth, and underage drinking plays a significant role in the leading causes of death for 15- to 24- year-olds -- including impaired driving, homicide, suicide, drownings, fires and burns. As a result of alcohol consumption, young people suffer from health problems, engage in premature and risky sexual activity, and fall prey to criminal victimization or criminal activity, especially sexual assault. Alcohol-related traffic crashes also pose a significant health risk, especially for youth.

Lack of information and knowledge about the risks of drinking contributes to high risk alcohol consumption. Many drinkers, especially young people, are unaware of basic facts, such as that an overdose can kill, that four or five drinks nearly every day is a great risk, or that wine coolers and beer can get a person drunk. Unfortunately, the well-funded advertising campaigns of the beer, wine and now, distilled spirits industries exacerbate the problems caused by lack of information. In 1995, the beer and wine industries' spent over \$750 million for broadcast alcohol advertisements, many of which are designed to appeal to youth. The distilled spirits industry's recent decision to broadcast ads heightens concerns that alcohol advertising will increase.

As a result, young people need information that will help them evaluate the more than 2,000 broadcast alcohol advertisements that they are exposed to annually. A rule requiring counter-advertisements will provide the public with important information about the hazardous consequences of high risk alcohol consumption. Counter-advertisements have been used

effectively in the past to address public health issues. Most notably, their use in the late 1960's heightened public awareness of the hazards of smoking.

Alcohol is a distinctive product which has historically been subject to regulation. Indeed, the purchase of alcohol is unlawful for those under 21 years of age. The fact that young people are continually exposed to broadcast alcohol advertisements despite these laws indicates the need for counter-ads to educate young people.

A rule requiring counter-advertisements would also be an enforceable means of responding to alcohol advertising, consistent with public policy. The FCC has the authority to require broadcasters to air counter-advertisements as part of licensees' obligation to serve the public interest, convenience and necessity. Moreover, because counter-advertisements provide the public with more information, these measures do not conflict with the First Amendment protection of speech. Following the model used for cigarette counter-ads, the FCC should require broadcasters that air alcohol advertisements also provide free airtime for a "significant amount" of alcohol counter-advertisements.

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PETITION FOR RULEMAKING

The National Council on Alcoholism and Drug Dependence, Inc. and Mothers Against Drunk Driving, joined by the American Academy of Pediatrics, American College of Nurse-Midwives, American Council on Alcohol Problems, American Society of Addiction Medicine, Center for Science in the Public Interest, Central Nebraska Council on Alcoholism, The Christian Life Commission of the Southern Baptist Convention, The Commonwealth Prevention Alliance, General Boards of Global Ministries on Church and Society/United Methodist Church, The Latin Council on Alcohol and Tobacco, The Manocherian Foundation, The Marin Institute for the Prevention of Alcohol and Other Drug Problems, Maryland Underage Drinking Prevention Coalition, National Association of Alcoholism and Drug Abuse Counselors, National Association of Public Health Professionals-Council on Alcohol Policy, National Organization for Victim Assistance, National PTA, National Victim Center, National Women's Christian Temperance Union, St. Vincent College Prevention Projects, Temperance League of Kentucky, Trauma Foundation Center on Alcohol Advertising, Victims Rights Political Action Committee submit this Petition requesting that the Federal Communications Commission adopt a rule requiring counter-

advertisements (hereinafter counter-ads or counter-advertisements) to address the detrimental impact that wine, beer and distilled spirits have on the public health and welfare.¹

High risk alcohol consumption is a significant public health threat. Alcohol advertising in the broadcast media combined with a lack of information about the effects of alcohol consumption exacerbates this problem. The FCC must address broadcasters' role in this public health crisis by requiring broadcasters that air alcohol advertisements to provide free airtime for a significant amount of advertisements that present information on the potential hazards of high risk alcohol use.

I. HIGH RISK ALCOHOL CONSUMPTION HAS A DETRIMENTAL IMPACT UPON THE PUBLIC HEALTH AND WELFARE

Alcohol contributes to the loss of 100,000 lives each year, and is the third leading cause of preventable death.² Between 1985 and 1990, the nation lost \$98.6 billion in reduced or lost productivity, medical care, crime and other social costs due to alcohol consumption.³ According to a survey by the Center for Disease Control and Prevention, the number of pregnant women who frequently drink alcohol has increased from 32,000 in 1991 to 140,000 in 1995, thereby increasing the risk that their children will suffer mental retardation, learning disorders and other problems.⁴ Alcohol is also a factor in more than half of all incidents of domestic violence.⁵

¹For a description of each organization, see Appendix.

²J. McGinnis & W. Foege, Actual Causes of Death in the United States, 270 JAMA 2208 (1993).

³National Institute for Alcohol Abuse and Alcoholism, 17 Alcohol Health & Research World 10 (1993).

⁴Center for Disease Control and Prevention, Alcohol Consumption Among Pregnant and Childbearing-Aged Women -- United States, 1991 and 1996, Morbidity & Mortality Weekly

More important, underage drinking is an acute national problem. The Department of Health and Human Services estimated that in 1995 there were 11 million underage drinkers, of which two million were heavy drinkers.⁶ According to a 1996 study, 61% of high school seniors reported that they had been drunk at least once during the last year.⁷ Young people have easy access to beer and liquor and begin drinking at a median age of 13 years.⁸ Underage drinking is common throughout middle school and high school, with over 80% of high school students saying that they had used alcohol at least once.⁹ Many of them find themselves in state-funded alcohol programs before their 21st birthday.¹⁰

Report, Apr. 25, 1997 at 345. These women, all between the ages of 18 and 44, had seven or more drinks a week, or drank five or more drinks at once in the month prior to the survey. Id.

⁵J. Collins & P. Messerschmidt, Epidemiology of Alcohol-Related Violence, 17 Alcohol Health & Research World 95 (1993).

⁶In a 1995 survey, 4.4 million underage Americans reported "binge" drinking and 1.7 million reported binge drinking or drinking heavily. National Institute on Drug Abuse, 1995 National Household Survey on Drug Abuse.

⁷L. D. Johnston, P. M. O'Malley and J.G. Bachman, Monitoring the Future Study, 1975-1995 (vol. 1 -- Secondary School Students), (National Institute on Drug Abuse, HHS 1996).

⁸Office of the Inspector General, US Department of Health and Human Services, Youth and Alcohol: A National Survey. Drinking Habits, Access, Attitudes, and Knowledge, Washington, DC, 6/91; Public Health Service, Healthy People 2000: National Health Promotion and Disease Prevention Objectives (HHS 1990).

⁹In a recent study of high schoolers, 55% of eighth graders and 70.5% of tenth graders reported drinking. The study also reported that 15% of eighth graders, 24% of tenth graders and 30% of twelfth graders had at least 5 drinks in a row during the two weeks preceding the survey. George D. Comerchi, Paul G. Fuller, Sandra F. Morrison, Cigarettes, Drugs, and Teens, Patient Care, Feb. 28, 1997, at 56.

¹⁰In 1993, underage drinkers represented nearly 10% of those admitted to state-funded alcohol treatment programs. H.R. 3473, 104th Cong., 2nd Sess. (1996).

As a result of early drinking habits, young people, whose bodies are not fully developed and are more susceptible to the effects of alcohol, can suffer numerous serious alcohol-related problems. Unable to cope with their problems maturely, teenagers drink when they are upset, bored or want to feel high.¹¹ Their alcohol consumption increases the likelihood that they will engage in early and unsafe sex, resulting in pregnancies or sexually transmitted diseases, including HIV.¹² There is also a strong link between alcohol abuse, suicides and violent crimes, such as domestic violence, sex-related crimes, physical assaults, impaired driving accidents and homicides.¹³ In fact, alcohol use plays a significant role in all leading causes of death for people between the ages of 15 and 24.¹⁴

Driving under the influence of alcohol continues to be one of the major health problems in the U.S. Indeed, impaired driving is the most frequently committed violent crime in this country.

¹¹Office of the Inspector General, US Department of Health and Human Services, Drinking Habits, Access, Attitudes, and Knowledge, Washington, DC, 6/91. (Of the teenagers who binge drink, 39% drink alone, 58% drink when upset, 30% drink when bored, and 37% drink to feel high.)

¹²National Institute on Alcohol Abuse and Alcoholism, Alcohol Topics: Fact Sheet-- Alcohol and Youth, Mar. 22, 1995; Press Conference of Surgeon General Antonia Novello, Youth and Alcohol -- Unrecognized Consequences, Wash. D.C. Apr. 13, 1992. (At the time of the study, alcohol use was the best predictor of early sexual activity by 9th graders, as well as of their failure to use contraception. Among high school students, drinkers were four times more likely to have sex and twice as likely to have slept with four or more partners than non-drinkers.)

¹³National Institute on Alcohol Abuse and Alcoholism, Eighth Special Report to Congress on Alcohol and Health, 9/93, p. xi. In addition, at least 50-65% of all suicides among youth are associated with alcohol use. Alcohol use is associated with 95% of violent crimes on campus and 90% of campus rapes. Liquor Ads Community Action Packet, Alcohol and Youth, <http://www.cspinet....booze/alc youth.html>.

¹⁴Centers for Disease Control, Monthly Vital Statistics Report, Vol. 43, No. 6(s), March 22, 1995. The leading causes of death for young people include drunk driving, homicide, suicide, drownings, fires and burns.

In 1995, 17,274 people were killed and more than one million injured in alcohol-related traffic crashes. These fatal crashes cost society more than \$45 billion each year in direct costs and an additional \$67 billion in lost quality of life. Forty-one percent of all traffic crashes are alcohol-related and alcohol involvement is still the greatest factor in motor vehicle deaths and injuries.¹⁵

Despite the fact that it is illegal in every state for anyone under the age of 21 to consume alcohol, underage drinking contributes significantly to the problem. Nearly 32 percent of all deaths for people ages 15 to 20 result from motor vehicle crashes,¹⁶ and of the 6,220 young people who died in motor vehicle crashes in 1995, an estimated 2,206 (35.5%) of these fatalities were alcohol-related. As a result, motor vehicle crashes are the leading cause of death for 15 to 20 year olds, and alcohol-related traffic crashes remain one of the leading causes of death in this age group.¹⁷ Alcohol-related fatality rates are almost twice as great for 18, 19, and 20 year olds as for the population over the age of 21.¹⁸ With the projected increase in the youth population over the next decade, alcohol-related fatalities will increase unless the problem of underage drinking is addressed.

Alcohol-related problems, especially among young people, can be linked to a lack of information and knowledge about drinking. Young drinkers do not know many important facts

¹⁵The National Safety Council and National Highway Traffic Safety Administration, Setting Limits, Saving Lives, the Case for .08 BAC LAWS, (1997).

¹⁶Center for Disease Control, Vital Statistics Mortality Data-1993, (1994).

¹⁷Center for Disease Control, National Center for Health Statistics, NCHS-Vital Statistics Mortality Data-1993, Multiple Causes of Death (MCOD) File, (1994).

¹⁸National Highway Traffic Safety Administration, National Center for Statistics and Analysis, Fatal Accident Reporting System.

about alcohol nor do they fully understand the effects of its consumption. Many do not know that an overdose can kill, that four or five drinks nearly every day is a great risk, or that wine coolers and beer can get a person drunk.¹⁹

A. Broadcast alcohol advertising, high risk consumption of alcohol and underage drinking.

Lacking sufficient information about the effects of alcohol consumption, individuals, especially youth, can be easily influenced by alcohol advertisements that encourage drinking and contribute to alcohol-related problems. Each year, young people are exposed to about 2,000 beer and wine advertisements on television.²⁰ Recent figures indicate that beer and wine industries are spending more than \$750 million on broadcast advertising.²¹ Many of these ads are aired during programs with large youth audiences and contain images that appeal directly to youth. For example, fifty-six percent of children between grades 5 and 12 have said that alcohol advertising encourages them to drink.²² Additional studies show that advertisements increase young people's

¹⁹Over 2.6 million students do not know that an alcohol overdose can kill a person. One-third of high schoolers do not know that four or five drinks almost every day is a great risk. Nearly 260,000 students do not know that wine coolers and beer can get a person drunk. Office of the Inspector General, US Department of Health and Human Services, Drinking Habits, Access, Attitudes, and Knowledge, Washington, DC, 6/91.

²⁰V.C. Strasburger, Adolescents, Drugs and the Media, 4 Adolescent Medicine: State of the Art Rev. 391-415 (1993); C. Atkin, 1995 Survey and Experimental Research on Effects of Alcohol Advertising, in The Effects of the Mass Media on the Use and Abuse of Alcohol, Research Monograph no. 28, ed. S. Martin, 39-68, Bethesda, MD: U.S. Department of Health and Human Services.

²¹Ira Teinowitz and Michael Wilke, Cable Net to Accept Spirits Ads; Move by Black Entertainment TV Follows DISCUS Ending its Ban, Advertising Age, Nov. 11, 1996, at 1.

²²The Scholastic/CNN Newsroom Survey on Student Attitudes About Drug and Substance Abuse (Feb. 1990).

awareness and emotional response to products, their ability to recognize brands, their desire to own or use advertised products and their ability to recall advertisements.²³ Another study indicates that those who have seen beer advertising on television are predisposed to drink beer and do so more frequently as adults.²⁴

Moreover, some alcohol advertisements use specific techniques to attract youth audiences. One study describes the alcohol industry's use of advertising styles to attract youth noting, "[a]lcohol advertising specifically targets young people by showing the supposed advantages of drinking---more friends, greater prestige, more fun, and greater sex appeal...and suggesting that without alcoholic beverages teens cannot have fun or be popular."²⁵ Beer companies use animal characters, such as the Budweiser Frogs, as well as models who look under 21 and are engaging in juvenile activities, like beach parties. Seagram, the second-largest seller of distilled spirits ran a 30-second commercial in June for Crown Royal whiskey that appealed to graduating seniors, many of whom are underage.²⁶ The commercial featured a dog, the "valedictorian," carrying a

²³Strasburger, V.C., Adolescents and the Media: Medical and Psychological Impact. (Thousand Oaks, CA: Sage Publications) (1995).

²⁴H.R. 3473, 104th Cong., 2nd Sess. (1996). In addition, other studies indicate that beer ads increases children's ability to recall brand names and slogans and to associate beer with fun and adult behavior. Alaska, Petition for Rulemaking, Banning the Advertising of Distilled Spirits in Electronic Media Broadcast, (citing What You Can Do About Broadcast Liquor Ads, Center for Science in the Public Interest, Action Alert, distributed by Joint Together Online, (11/6/1996) <<http://www.jointogether.org>>.

²⁵American Academy of Pediatrics, Committee on Communications, Children, Adolescents, and Advertising, 95 Pediatrics 295-297 (1995) (citing N. Postman, C. Nystrom, L. Strate, and C. Weingartner, Myths, Men & Beer (1988)).

²⁶Harry Berkowitz, Group Blasts Ads it Says are Too Good to be True, Newsday, Dec., 1996, at A 59; Chuck Tennert, Banned Liquor; Liquor Advertising, Video Magazine, Dec. 1996, at 13.

fifth of Crown Royal to the tune of "Pomp and Circumstance," the music millions of teenagers hear at graduation.²⁷

The alcohol industry's placement of its ads in the broadcast media also reflects its focus on youth audiences. Leading alcohol companies have run ads on television and radio stations that are heavily patronized by youths and during time periods in which at least half of the audience was underage.²⁸ For example, a University of Michigan study on the appeal of beer advertising to youth found that the majority of young people had seen advertisements for Budweiser, Bud Light and Coors, and found the ads compelling.²⁹ Ninety-nine percent of the youth surveyed reported seeing the Budweiser Frog ads, 92% liked them, and 38% said that the ads make drinking seem more appealing.³⁰ In addition, a significant amount of alcohol advertising occurs during sports programming, especially the Super Bowl, which has a huge underage audience.³¹ Moreover,

²⁷Harry Berkowitz, Group Blasts Ads it Says are Too Good to be True, Newsday, Dec., 1996, at A 59.

²⁸Chuck Ross and Ira Teinowitz, Beer Ads Had Wide Underage Reach on MTV: Tracking of Audience Levels Shows Violations of Industry's Own Code, Advertising Age, Jan. 6, 1997; Communications Daily, Apr. 9, 1997 (Anheuser-Busch and Miller Brewing have both run ads on MTV, a cable station with substantial underage patronage.); Liquor Ads Community Action Kit, Seagram's Liquor Ads spread on TV and Radio, Action Alert, November 1996. <http://www.cspinet.org/booze/novkit.html>. (Seagram utilizes "youth-oriented rock and roll or album-oriented rock formats" for its gin ads on stations with teen audiences.)

²⁹Bruce Horovitz and Melanie Wells, Ads for Adult Vices Big Hit with Teens, USA Today, Jan. 31, 1997 at 1A.

³⁰Id.; For the Bud Light "I love you, man" ad, 62% reported seeing the ad, 89% liked it, and 35% said it makes drinking seem more appealing. For the Coors "Tap the Rockies" ad, 56% reported seeing the ad, 55% liked it, and 35% said that it makes drinking seem more appealing. Id.

³¹Katharine Seelye, Trickle of Television Liquor Ads Releases Torrent of Regulatory Uncertainty, N.Y. Times, Jan. 12, 1997, at § 1, pg. 10; Alaska Petition for Rulemaking, Banning

according to a survey by Advertising Age, Seagram has bought time for its ads primarily during sports and prime time programming.³² These spots have run during the World Series and NFL games on Fox outlets, as well as during “Cosby” and college football games.³³ Other Seagram’s ads ran during “NFL Monday Night Football, which has an average weekly viewing audience of about 3 million people between the ages of 2 and 20.”³⁴ Another distiller, Hiram Walker & Sons, has run advertisements for its Kahlua-based drink on programs in 22 local markets, including programs popular with teens and pre-teens.³⁵

B. The entrance of the distilled spirits industry into the alcohol advertising market increases the need for the FCC to require counter-advertising.

Six months after Seagram aired its first ad, and less than 96 hours after Election Day, the Distilled Spirits Council of the U.S. (DISCUS), which represents 90% of distilled spirits sold in the U.S., voted unanimously to allow advertising on radio and television for the first time since 1936 and 1948 respectively.³⁶ DISCUS’s decision has led to an influx of broadcast alcohol

the Advertising of Distilled Spirits in Electronic Media Broadcast; John M. Broder, The Chairman of the F.C.C. Starts a Crusade Against Hard Liquor Ads on Television, N.Y. Times, Apr. 9, 1997, at D7.

³²Chuck Ross and Ira Teinowitz, No Local Outcry at Stations Airing Liquor Ads, Advertising Age, Nov. 18, 1996, at 1.

³³Id.

³⁴Chuck Ross, Seagram Chairman Defends Liquor TV Ads; FCC seeking Information on When the Spots Have Been Aired, Advertising Age, at 1; Nightline: Liquor and TV Ads (ABC television broadcast, Nov. 11, 1996) (transcript on file with Lexis).

³⁵John M. Broder, The Chairman of the F.C.C. Starts a Crusade Against Hard Liquor Ads on Television, N.Y. Times, Apr. 9, 1997 at D7.

³⁶Stuart Elliott, Liquor Industry Ends Its Ad Ban in Broadcasting, N.Y. Times, Nov. 8, 1996, at A1; Ira Teinowitz and Michael Wilke, Cable Net to Accept Spirits Ads; Move By Black

advertising. Since dropping the ban, distillers have already spent a few million dollars for advertisements on local affiliates, cable channels and television networks, including Black Entertainment Television and Continental Cablevision Inc.³⁷ In November 1996, distillers were advertising on at least 25 television and 50 radio stations throughout the country.³⁸ Not surprisingly, distilled spirits companies, who have a history of targeting minority audiences overwhelmed with other serious problems, are now airing their ads on smaller television stations and cable stations that serve large black and Hispanic audiences.³⁹

The entrance of distillers into the advertising market may create an “alcohol advertising war” that will exacerbate the nation’s underage drinking problem.⁴⁰ Currently, public disapproval has led the major networks to reject advertisements for distilled spirits.⁴¹ However, it is unclear

Entertainment TV follows Discuss Ending its Ban, Nov. 11, 1996, at 1; Govt. Has Options; Reaction Strong Against TV-Radio Hard Liquor Commercials, Comm. Daily, Nov. 12, 1996 at 4.

³⁷John Broder, The Chairman of the F.C.C. Starts a Crusade Against Hard Liquor Ads on Television, N.Y. Times, Apr. 9, 1997, at D7; Doug Halonen, FCC ‘Fact-Finding’ on Liquor Ads, Electronic Media, Nov. 4, 1996, at 1; FTC Opens Investigation of TV Alcohol Advertising; Probe Initially Targets Advertisements Run by Seagram and Stroh Brewery, <http://www.winebiz.com/ad2.html>.

³⁸Seagram Liquor Ads Spread on TV and Radio, Action Alert, Nov. 1996. <http://www.cspinet.org/booze/novkit.html>.

³⁹Paul Farhi, Smaller Stations Most Willing to Air Hard Liquor Ads; Distillers Again Accused of Targeting Minorities, Wash. Post, Dec. 27, 1996, at G1; Comm. Daily, Apr. 8, 1997.

⁴⁰John Broder, The Chairman of the F.C.C. Starts a Crusade Against Hard Liquor Ads on Television, N.Y. Times, Apr. 9, 1997, at D7.

⁴¹Katherine Seelye, Trickle of Television Ads Releases Torrent of Regulatory Uncertainty, N.Y. Times, Jan. 12, 1997, § 1, at 10. “After the industry announced on Nov. 7 that it was dropping the voluntary restraint...ABC, CBS, NBC and Fox said they would refuse to accept liquor commercials, with network officials acknowledging that they did not want to provoke a public outcry or risk losing their beer revenue.” *Id.*

how long these voluntary policies will be in place. Indeed, an advertising war seems likely given that the distilled industry is plagued by competitive pressures. Since 1980, liquor consumption dropped 30% while beer consumption rose 5%.⁴² Undoubtedly, distillers have a strong market incentive to create enticing advertisements to increase consumption. In addition, the distilled spirits industry is also concerned about establishing an advertising presence on television to secure its ability to advertise on other video services, such as DBS.⁴³

Moreover, the experience of other countries shows that distilled spirits broadcast advertisements are effective. Facing declining sales, distillers in Great Britain broke their 40-year-old ban on broadcast advertising just before a holiday season, and one year later, reaped the benefits.⁴⁴ For example, after advertising on television, the British gin market rebounded from a 4% decline in sales to a 3% rise. Now the gin producers, citing television ads as the impetus for the increase, have redirected their advertising budgets to television.⁴⁵ Because distilled spirits broadcast ads were so effective in Britain, the industry may be motivated to expand its use of such ads in the U.S.

⁴²Id.

⁴³Id.

⁴⁴Nightline: Liquor and TV Ads (ABC television broadcast, Nov. 11, 1996) (transcript on Lexis).

⁴⁵Id.

II. A RULE REQUIRING COUNTER-ADVERTISEMENTS WOULD EFFECTIVELY ADDRESS THE DANGERS POSED BY ALCOHOL CONSUMPTION

To address the adverse impact of high risk alcohol consumption on the nation, and especially the problems caused by underage drinking, the FCC should adopt a rule requiring licensees that accept alcohol ads to air counter-advertisements. Counter-ads would not only provide crucial information about alcohol but would also “deglamorize” alcohol consumption.⁴⁶ Counter-ads reveal how advertisements can create false perceptions.⁴⁷ As a result, they are effective in challenging misleading images delivered by alcohol advertising campaigns.⁴⁸

In the late 1960's, tobacco counter-ads were used effectively to educate the public about the dangers of smoking, and to reduce cigarette consumption. In 1967, the FCC required broadcasters airing cigarette commercials to air cigarette counter-ads. As Richard Kluger notes in Ashes to Ashes, “The anti-cigarette commercials mandated by the FCC appeared to be having an arresting effect on the nations’ consciousness of the perils of smoking.”⁴⁹ By 1969, annual

⁴⁶“Counter-advertising is using the same techniques employed so persuasively by the advertising industry, but in this case, to deglamorize alcohol and tobacco.” Richard L. Peck, The Media War on Addictions: Report from the Front Lines, Alcoholism & Addiction Magazine, Mar. 1993, at 12.

⁴⁷Id.

⁴⁸U.S. Dep’t of Health and Human Services, Pub. No. 108, Advertising Health: The Case for Counter-Ads. A Report of the Surgeon General 716-726 (1993).

⁴⁹Richard Kluger, Ashes to Ashes: America’s Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris, (Alfred A. Knopf 1996). According to Ashes to Ashes, counter-ads aired 1967-69 caused many smokers to reduce their intake and contributed to the decrease in annual per capita consumption.

cigarette consumption had dropped to 529 billion cigarettes from 549 billion in 1967.⁵⁰ One year later, counter-ads had contributed to the “second major decline in per capita consumption of cigarettes -- about 10 percent...”⁵¹ In one survey, nearly half of the respondents recalled at least one of the ads, and one-third of smokers surveyed said that they were smoking fewer cigarettes or were considering cutting back as a result of the ads.⁵² However, in 1971, after broadcasters stopped airing cigarette counter-ads, cigarette consumption rose to 546 billion.⁵³

In addition, other counter-ad programs have been effective in enhancing public awareness and challenging unrealistic perceptions created by glamorous advertisements. State health agencies in California, Michigan and Minnesota have used counter-advertisements as a part of their anti-smoking campaigns, and found that their efforts to reach certain targeted groups were successful. In Minnesota, 70% of the groups targeted recalled at least one radio ad, and more than 95% recalled at least one TV ad. In California, 70% to 75% of targeted groups recalled the ads.⁵⁴ Also, anti-drug use public-service announcements and advertising campaigns have had

⁵⁰Capital Broadcasting Co. v Mitchell, 333 F. Supp. 582, 589 n.18 (DC 1971) (Wright, J. Skelly, dissenting), *aff'd sub nom. Capital Broadcasting Co. v Acting Attorney General*, 405 U.S. 1000 (1972).

⁵¹U.S. Dep't of Health and Human Services, Pub. No. (CDC) 89-8411, Centers for Disease Control: Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General (1989).

⁵²Richard Kluger, Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris, (Alfred A. Knopf 1996).

⁵³Capital Broadcasting Company, 333 F. Supp. at 589 n.18 (1971) (Wright, J. Skelly, dissenting).

⁵⁴1991 U.S. Dep't of Health and Human Services, Public Health Rep. No. 106, Paid Advertising a Powerful Tool for State Health Agencies 595 (1991).

positive results. According to a 1991 study, of those exposed to anti-drug advertisements, 92% had more knowledge of the dangers of drugs, 60% gained stronger beliefs about the dangers of drugs, 52% developed more negative attitudes toward drug use and 75% said that the ads affected their behavior.⁵⁵

A. The Commission has the authority to require counter-ads to address the detrimental impact that alcohol consumption has on the public.

The FCC's authority to require counter-ads derives from its duty to grant and renew only broadcast licenses that serve the "public interest, convenience and necessity."⁵⁶ Recent FCC decisions demonstrate that broadcasters' obligation to operate in the public interest includes a duty to educate and inform young people.⁵⁷ Moreover, just last month, the FCC gave broadcasters \$70 billion worth of digital television licenses for free, with the assumption that the broadcasters would take seriously their obligation to serve the public.⁵⁸ In view of this recent

⁵⁵Cohen Reis *et al.*, The Impact of Anti-Drug Advertising--Perceptions of Middle and High School Students (1991).

⁵⁶47 U.S.C. §§ 309(a), 309(k); 47 U.S.C. §§ 154(I), 303(r). See also 47 U.S.C. § 151 (provides the Commission the authority and responsibility to regulate TV and radio in the US "for the purpose of promoting safety of life and property through the use of wire and radio communications."); 47 U.S.C. § 307(a) (provides the FCC with the authority to make sure that broadcasters operate in the public interest).

⁵⁷See, e.g., Policies and Rules Concerning Children's Television Programming Revision of Programming Policies for Television Broadcasting Stations, MM Docket No. 93-48, 11 FCC Rcd 10660, 10662 (1996) (Commission echoes Congress in stating that requiring broadcasters to serve the educational and informational needs of children is "clearly within the scope of the long recognized obligation of the broadcasters to serve the public interest.")

⁵⁸Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report and Order, MM Docket No. 87-268, FCC 97-116 (rel. Apr. 21, 1997). See also, Edmund L. Andrews, Battle Over the Budget: Raising Revenue; Airwaves Plan Is Called Give-away to Broadcasters, N.Y. Times, Oct. 28, 1996, § 1, at 9.

windfall, broadcasters have a heightened duty to keep their advertising and programming consistent with the public interest.

The impact of high risk alcohol consumption on the public health is undoubtedly a significant public interest concern. As the DC Circuit Court found in Banzhaf, “the public interest indisputably includes the public health.”⁵⁹ The medical community, the general public, and the federal and state governments all agree that high risk alcohol consumption, especially among young people, is a significant public health issue.⁶⁰

The FCC previously required counter-ads in response to broadcast cigarette advertising because of the serious public health threat posed by that product. In 1967, after receiving a complaint that a broadcast station had aired cigarette commercials without allowing a presentation of “contrasting views on the issue,” the FCC ruled that broadcasters were required to offer a

⁵⁹Banzhaf v. FCC, 405 F.2d 1082, 1096 (D.C. Cir. 1968), *cert denied*, 396 U.S. 842 (1969).

⁶⁰Comm. Daily, Mar. 4, 1997 (60 organizations support Kennedy’s bill to ban alcohol advertising on broadcast media). Chuck Ross and Ira Teinowitz, Beer Ads Had Wide Underage Reach on MTV: Tracking of Audience Levels Shows Violations of Industry’s Own Code, Jan. 6, 1997, at 4. (At least 26 members of Congress have requested an inquiry); Petition for Rulemaking, In the Matter of Banning the Advertising of Distilled Spirits in Electronic Broadcast Media. (Petition from the State of Alaska); Hundt Plans to Force Public Vote on Liquor Ads, Comm. Daily, Apr. 7, 1997. (13 states have asked the FCC to consider alcohol advertising.) Petition for Notice of Inquiry, In the Matter of The Advertising of Distilled Spirits and other Alcoholic Beverages in Electronic Broadcast Media. (Petition from the Center for Science in the Public Interest, *et al.*); Text of A letter From the President to Reed E. Hundt, Chairman of the Federal Communications Commission, Apr. 1, 1997. (President agrees with Hundt that the FCC has an obligation to consider any actions that would protect public interest, agrees that liquor industry should go back to voluntary ban); Advertising Age, July 1, 1996, at 25. (The American Medical Association’s House of Delegates voted to ask for a legislative and regulatory ban of liquor ads from television).

substantial amount of free airtime for cigarette counter-ads.⁶¹ While the FCC cited the broadcast licensees' obligation under the fairness doctrine to afford a reasonable opportunity for conflicting views on controversial issues of public importance, its decision was based primarily on the licensees' duty to serve the public interest.⁶² Essentially, the FCC concluded that airing advertisements that so heavily impact public health and safety invoked the broadcasters' public interest obligation.⁶³ The FCC found that, "[t]he Commission's present ruling that advertising falls within the public interest responsibilities of a licensee is not a novel or unprecedented policy determination.... The Commission has always directed itself particularly to programming and advertising which bears upon public health and safety."⁶⁴

⁶¹Cigarette Advertising, 9 FCC 2d 921, 949 (1967), *aff'd* Banzhaf v. FCC, 405 F.2d 1082, 1091 (DC Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

⁶²We recognize that the Cigarette ruling no longer stands "as a fairness doctrine precedent," (see Fairness Report, 50 FCC 2d 1, 26 (1974)), and that the fairness doctrine is no longer applied in any event. Syracuse Peace Council v. Television Station WTVH, 2 FCC Rcd 5043 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff'd* Syracuse Peace Council v. FCC, 867 F.2d 654 (DC Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). However, the public interest basis of the Cigarette decision still stands and is applicable only to products like cigarettes and alcohol that are extraordinary in their impact on public health and safety. See Banzhaf v. FCC, 405 F.2d 1082, 1096 (D.C. Cir. 1968), *cert denied*, 396 U.S. 842 (1969).

⁶³Cigarette Advertising, 9 FCC 2d 921, 949 (1967). Previously, the Commission had hinged the renewal of broadcast licenses on the discontinuance of advertisements that included "alleged medical prescriptions and quack remedies" that were a detriment to the public health. Id.; See also Notice of Proposed Rulemaking, Amendments of Part 73 of the Federal Communications Rules With Regard to the Advertisement of Cigarettes, 16 FCC 2d 284 (1969); Banzhaf 405 F.2d at 1096.

⁶⁴Cigarette Advertising, 9 FCC 2d 921, 926 (1967).

The FCC's public interest justification for imposing counter-ads was upheld by the D.C.

Circuit in Banzhaf v. FCC.⁶⁵ The Court held,

[t]he ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to the public health....[T]here is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter....This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.⁶⁶

The FCC's cigarette counter-ad requirement provides a model for a rule requiring alcohol counter-ads. Like cigarette use, high risk alcohol consumption threatens public health and safety.⁶⁷ Moreover, the entrance of the distilled spirits industry into broadcast advertising has increased the urgency for the FCC to address alcohol advertising. The alcohol industry is using

⁶⁵Banzhaf 405 F.2d at 1091-1993.

⁶⁶Id. at 1092-1093. (emphasis added). Subsequently, Congress enacted the Public Health Cigarette Smoking Act of 1969 banning tobacco ads from television and radio. Because of Congress' ban on cigarette commercials, the FCC ruled in 1970 that counter-ads were no longer required. In so doing, it reiterated that its decision to require counter-ads had been based on the public interest standard, as recognized by the D.C. Circuit in Banzhaf. "The Court there noted...that the Commission's holding was based really on the public interest standard...and that that standard clearly comprehended a public health consideration such as this." (cite omitted) Cigarette Advertising-Anti-smoking Presentations, 27 FCC 2d 453, 457 (1970). When the D.C. Circuit upheld the advertising ban in Capital Broadcasting Company in 1971, the Court also noted that it had evaluated the counter-ad rule based on the public interest standard. 333 F. Supp. 582, 587 (D.D.C. 1971).

⁶⁷See Section I. of the petition, supra. Indeed, from as early as 1946, the FCC has recognized that alcohol advertising could eventually pose a significant public issue. As noted in Banzhaf, "[t]he Commission observed, 'It can at least be said that the advertising of alcoholic beverages can raise substantial issues of public importance.'" See Banzhaf 405 F.2d at 1092 (citing Petition of Sam Morris, 11 F.C.C. 197, 199 (1946)).

the uniquely powerful broadcast media to advance a product that threatens the health of a significant part of the population.

Alcohol advertising stands on extraordinary footing because alcohol is different from all other products. Alcohol has twice been the subject of Constitutional amendment, the Eighteenth Amendment barring all manufacture, sale and transport, and the Twenty-First Amendment repealing Prohibition, but specifically allowing the states to legislate in this field.⁶⁸ Requiring counter-ads would be consistent with state and Congressional policies aimed at addressing underage drinking and high risk alcohol consumption.⁶⁹ State governments have taken steps to address alcohol misuse among youth by increasing the legal drinking age to 21, imposing automatic license suspensions for drinking and driving, and prohibiting open bottle containers.⁷⁰ In addition, Congress has passed labeling laws requiring warnings about the dangers of drinking when pregnant.⁷¹ These nationwide advocacy efforts contributed to a decrease in alcohol

⁶⁸U.S. Const., amend XVII, XXI. Significantly, Prohibition was repealed because of the resulting black market and crime, and not because of any change in the determination that alcohol consumption has large adverse consequences to public health.

⁶⁹Text of a Letter From the President to Reed E. Hundt, Chairman of the Federal Communications Commission, Apr. 7, 1997.

⁷⁰See, e.g., 23 U.S.C. § 158 (1994) (providing that states failing to raise their legal drinking age to 21 by Oct. 1, 1986, faced cuts in highway aid); 23 U.S.C. § 161 (1995) (providing that states that do not enact “zero tolerance” laws for underage drinking and driving face cuts in highway aid.) Thirty-eight states and the District of Columbia have laws which provide for immediate suspension of a license when a driver fails a breath test. At least 25 states have law prohibiting open containers in passenger compartments of vehicles. See Jennifer E. Dayok, Administrative Driver’s License Suspension: A Remedial Tool That Is Not In Jeopardy, 45 Am. U. L. Rev. 1151, 1153 (1996).

⁷¹See, Alcohol Beverage Labeling Act of 1988, 27 U.S.C.A. 213-219a (West Supp. 1989).

consumption between 1986 and 1993.⁷² However, the competitive pressure to increase sales and the entrance of the distilled spirits industry into the advertising market may prompt an advertising war that will reverse some of these advances.

The FCC must take remedial action because a large percentage of youth are exposed to broadcast advertising promoting and glamorizing the use of a product that is illegal for them to purchase, and they are using it in significant numbers. Youth represent a large portion of the broadcast audience, even at night. In fact, Nielsen Media Research indicates that 18 million viewers ages 2-17 watch television between 9 and 9:30 p.m. Monday through Sunday, representing 31% of the population in that age group and more than 17% of all viewers during that time slot.⁷³ Similar figures are available for radio.⁷⁴ In these circumstances, the public interest requires that the broadcast licensee who is profiting greatly from this use of its facilities devote a reasonable amount of time for counter-ads informing the youth audience of the risks stemming from high risk alcohol consumption.

The case for counter-ads can be based solely on the need to inform the youth audience. Alcohol consumption by individuals over 21 years of age is generally lawful, and unlike cigarette use, adult alcohol consumption does not always pose a health hazard. Still, increasing the amount

⁷²During that time alcohol advertising dropped from \$1.511 billion to \$808 million (inflation-adjusted dollars). George A. Hacker and Laura Anne Stuart, Double Dip: The Simultaneous Decline of Alcohol Advertising and Alcohol Problems in the United States, June 1995. <http://www.cspinet.org/booze/ddip.html>.

⁷³Nielsen Media Research, 1992-1993 Report on Television at 5,11 (1993).

⁷⁴See, e.g., Bacon's Radio Directory, Directory of Radio Stations Programming Contacts, 1997, at 678, 680-681, 683 (1996).

of information on alcohol consumption would help educate adults as well. Moreover, people of all ages would benefit if the societal toll from high risk alcohol use were reduced.

Finally, because the FCC sets general policies for broadcasters, it has a unique role to play in stemming the adverse impact of alcohol advertising on public health. While the FTC may use case-by-case adjudications to punish advertisers' malfeasance, such as deceptive, misleading unfair or otherwise inappropriate advertisements of alcohol,⁷⁵ only the FCC can require that broadcasters carry alcohol counter-ads. An FCC rule requiring counter-ads would be a complement to, rather than a substitute for, the FTC's actions.⁷⁶

B. A counter-ad requirement would increase the amount of information available to the public and thus, would be consistent with the First Amendment.

The goal of a counter-ad rule is the delivery of more information to the public. Consequently, a counter-ad rule does not raise the same constitutional questions as regulations that prohibit commercial speech. While the Supreme Court has generally approached with skepticism "regulations that seek to keep people in the dark for what the government perceives to

⁷⁵Glen Weston *et al.*, Unfair Trade Practices and Consumer Protection 694 (5th ed. 1992). See also, Anthony Faiola, Beer, Liquor TV Ads Investigated, Wash. Post, Dec. 8, 1996, at C1; F.T.C. Opens an Inquiry On Beer Ads for the Young, N.Y. Times, Apr. 8, 1997, at A10. The FTC is currently investigating the advertising practices of Seagram America Co., Anheuser-Busch, Miller Brewing Company and Stroh Brewery Co.

⁷⁶When the FCC required cigarette counter-ads, the FTC and FCC worked in tandem to address broadcast advertising concerns. The FCC established the rule requiring counter-advertising for cigarette ads, while the FTC reported annually to Congress on smoking and its related health problems. During this time, the FTC also urged stronger warning labels, reported to Congress on the tobacco industry's deceptive advertising practices, and called for elimination of cigarette advertising on television. Richard Kluger, Ashes to Ashes at 326.

be their own good,”⁷⁷ alcohol counter-ads would not keep the public “in the dark.” Like cigarette counter-ads, alcohol counter-ads would increase the amount of information available to the public to allow for informed judgments on the consumption of a substance that could pose significant health risks.⁷⁸

III. THE COMMISSION SHOULD REQUIRE BROADCASTERS AIRING ALCOHOL ADVERTISEMENTS TO AIR A SIGNIFICANT AMOUNT OF SIMILARLY PLACED COUNTER-ADVERTISEMENTS THAT PROVIDE INFORMATION ON AVOIDING ALCOHOL ABUSE.

We propose that the FCC require any broadcast licensee that airs alcohol ads to air a “significant amount” of counter ads. This standard is consistent with the FCC’s prior rulings concerning cigarette counter-ads. In discussing its cigarette counter-ad requirement, the FCC stated, “[w]e stress again what is called for is the allocation of a significant amount of time each week, absent unusual circumstances, to the presentation of the opposing viewpoint in the case of cigarette commercials.”⁷⁹

We also propose that the FCC require that alcohol counter-ads run within reasonable proximity to the alcohol advertisements. Proximity is an important element of counter-

⁷⁷ 44 Liquor Mart Inc. v. Rhode Island, 116 S. Ct. 1499, 1508 (1996). For example, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976), the Court invalidated a Virginia statute that prevented pharmacists from advertising the prices of prescription drugs. Similarly, in 44 Liquormart the Court struck down a Rhode Island statute that prohibited the mention of liquor prices in advertising. Id.

⁷⁸ According to the dissent in Capital Broadcasting Company, “[w]hereas the Banzhaf decision had increased the flow of information by air so that the American people could make an informed judgment on the hazards of cigarette smoking, the 1969 Act cut off the flow of information altogether.” 333 F. Supp. 582 (1971).

⁷⁹ Cigarette Advertising, 9 FCC 2d 921, 942 (1967).